CWI of Maryland, Inc. *and* Drivers, Chauffeurs, Warehousemen and Helpers, Local Union 639, a/w International Brotherhood of Teamsters, AFL–CIO. Cases 5–CA–24908, 5–CA–25116, and 5–RC–14133

July 11, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

On March 18, 1996, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed limited cross-exceptions with supporting briefs and briefs in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, CWI of Maryland, Inc., Beaver Heights, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees, engaging in surveillance and creating the impression of surveillance, threatening employees with reprisals or telling them that their union activity would be futile, and telling employees that they were being terminated or denied reassignment because of their union activity.

(b) Discharging employees because of their union activity.

(c) Failing and refusing to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate collective-bargaining unit.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union in good faith as the exclusive representative of the employees in the following appropriate unit concerning the terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All truck drivers employed by the Employer at its Beaver Heights, Maryland location; but excluding all other employees, guards and supervisors as defined in the Act.

(b) Revoke the move of the drivers' reporting site to Central Garage, Virginia, and reestablish their reporting site in Beaver Heights, Maryland, restore work transferred to any other company for discriminatory reasons and, within 14 days of the date of the Board's Order, offer Richard Pace, Mark Barnes, Ken Covington, Kenneth Watson, Zonnie Peterson, John Davis, Orlando Bartee, Alvin McElveen, Charles Gentry, Elden Carrington, Irving Long, Charles Hubert, Joe Nelson, John Fort, Lester Baddy, Marilyn Bartee-el, Sarah Thompson, Stephen Alper, Tarik Muhammad, William Skinner, Andre Young, Dale Brown, Ennis Moore, James Proctor, Wyatt Vailes, John Marshall, Edward Hall, Eric Griffin, John Douglas, Wade Shields, Anthony Hicklin, Carl Stevenson, Daniel Ross, Donald Dasse, Joel Brown, Thomas Henson, Fred Sewer, James Daley, Marvin Sanders, Morris Redmond, and any other employee terminated as a result of Respondent's move of a portion of its operations from Beaver Heights, Maryland, to Central Garage, Virginia, or the transfer of a portion of its operations to any other employer, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make the above-named employees whole for any loss of earnings, other benefits, and expenses suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful dis-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel has excepted to the judge's failure to require the Respondent to mail a copy of the Notice to Employees to all discriminatees. We agree that, in the circumstances of this case, the full remedial provisions of the Order may not be realized if the notice is only posted at the Respondent's facilities. We shall modify the Order accordingly.

We shall further modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The Respondent will have the opportunity at the compliance stage to introduce relevant evidence concerning the burdensomeness of complying with the requirement that it reestablish Beaver Heights, Maryland, as the drivers' reporting site and restore work transferred to any other company for discriminatory reasons provided that such evidence was not available prior to the unfair labor practice hearing. See *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

charges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Beaver Heights, Maryland, and Central Garage, Virginia, copies of the attached notice marked ''Appendix.''[3] Copies of the notice on forms provided by the Regional Director of Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees, engage in surveillance or create the impression of surveillance of their union activities, threaten employees with reprisals or tell them that their union activity would be futile or that they are being terminated or denied reassignment because of their union activity.

WE WILL NOT discharge employees because of their union activity.

WE WILL NOT fail and refuse to recognize and bargain in good faith with the Union as the exclusive representative of our employees in an appropriate unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All truck drivers employed by the Employer at its Beaver Heights, Maryland location; but excluding all other employees, guards and supervisors as defined in the Act.

WE WILL revoke the move of the drivers' reporting site to Central Garage, Virginia and reestablish their reporting site in Beaver Heights, Maryland, WE WILL restore any work transferred to other companies for discriminatory reasons, and WE WILL, within 14 days from the date of the Board's Order, offer Richard Pace, Mark Barnes, Ken Covington, Kenneth Watson, Zonnie Peterson, John Davis, Orlando Bartee, Alvin McElveen, Charles Gentry, Elden Carrington, Irving Long, Charles Hubert, Joe Nelson, John Fort, Lester Baddy, Marilyn Bartee-el, Sarah Thompson, Stephen Alper, Tarik Muhammad, William Skinner, Andre Young, Dale Brown, Ennis Moore, James Proctor, Wyatt Vailes, John Marshall, Edward Hall, Eric Griffin, John Douglas, Wade Shields, Anthony Hicklin, Carl Stevenson, Daniel Ross, Donald Dasse, Joel Brown, Thomas Henson, Fred Sewer, James Daley, Marvin Sanders, Morris Redmond, and any other employee terminated as a result of our move of a portion of our facilities from Beaver Heights, Maryland, to Central Garage, Virginia, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above-named employees whole for any loss of earnings, other benefits, and expenses suffered as a result of the result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to

the discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

CWI OF MARYLAND, INC.

Angela S. Anderson, Esq., for the General Counsel.
Joel I. Keiler, Esq., for the Respondent.
Hugh J. Beins, Esq. (Beins, Axelrod, Osborne, Mooney & Green, P.C.), for the Charging Party-Petitioner.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Washington, D.C., on December 11 through 15, 1995, based on charges filed by Drivers, Chauffeurs, Warehousemen and Helpers, Local Union 639, a/w International Brotherhood of Teamsters, AFL–CIO (the Union) on November 22, 1994, and February 13, 1995, as thereafter amended, and complaints issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board) on January 27 and September 27, 1995, as amended and consolidated. The amended and consolidated complaints allege that CWI of Maryland, Inc. (CWI, Respondent, or the Employer) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by surveilling or creating the impression of surveillance of employee union activities, threatening employees to discourage such activities, discriminatorily discharging nearly all of the employees in the appropriate collective-bargaining unit because of their union activities, and by refusing to recognize and bargain with the Union. Respondent's timely filed answer denies the commission of any unfair labor practices.

Consolidated for hearing with the unfair labor practice allegations were objections to the conduct of an election held on February 3, 1995, and challenges to ballots cast in that election. The objections parallel allegations of the complaints; the challenges involve individuals alleged to have been discriminatorily discharged.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a corporation, with facilities in Beaver Heights, Maryland, and King William County, Virginia, is engaged in the business of transporting refuse from Washington, D.C., to landfills in Virginia. During the past 12 months, a representative period, in the course and conduct of its business operations, Respondent performed services valued in excess of $50,000 for Browning Ferris Industries (BFI), an enterprise engaged in interstate commerce and over whom the Board has asserted jurisdiction on a direct basis. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, Respondent admits, and I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

CWI began its present business operations in about December 1993. Its principal business is the hauling of trash from BFI's Washington, D.C. site to a landfill in King and Queen County, Virginia, a distance of about 140 miles. It also hauls trash, lime, and pebbles between the Washington, D.C. area and other points in Maryland, Pennsylvania, and Virginia. Its president is Wilton (Tony) Lash; Dwayne (Dino) Sawyer is the operations manager and the admitted supervisor of the tractor-trailer drivers.

Until the January 1995 move of its operations at issue herein, the drivers reported to CWI's offices and yard on Olive Street in Beaver Heights, Maryland. After punching the timeclock, they would pick up a semitractor, drive a couple of miles to BFI's lot on W Street S.E. in Washington, D.C., hook up to a tractor loaded with trash, haul it to the Virginia landfill, and return to W Street with an empty trailer.

Until about August 1994,[2] most of the drivers made two such runs every day or every other day. On days when they made two runs, they drove about 600 miles and worked from 12 to 16 hours. They earned $100 per run and they worked from 3 to 6 days a week, sometimes alternating two run days with days on which they made only one trip.

In the spring of 1994, some drivers pointed out that they were driving more hours per day than was permitted by the Department of Transportation's (DOT) regulations. As a result, Lash brought in a representative of the American Trucking Association (ATA) to review Respondent's operations. That review was conducted in July 1994 and a report was given to Lash on August 4. The reviewer, William McNalley, concluded that the hours drivers were working:

> was by far the largest area of concern. Almost all drivers were found to be falsifying their drivers daily logs to conceal hours of service violations.[3] This resulted (in most cases) from the operation of two round trips to the landfill in King-Queen County, VA, totaling approximately 585 miles. Since this operation results in actual driving and on duty times which are violations of the regulations, drivers either showed incorrect times on their logs or did not record the second trip.

The ATA report noted that ''from discussions with management, two round trips to the landfill in King-Queen County cannot be accomplished without violating the hours of service regulations.'' It recommended that Respondent ''re-

[1] Counsel for the General Counsel's unopposed motion to correct the transcript is granted.

[2] All dates hereinafter are between August 1994 and May 1995, unless otherwise specified.

[3] The reviewer found they were driving in excess of the permitted 10 hours per day, were onduty for more than the permitted 15 consecutive hours per day and were working more than 70 hours in 8 consecutive days. Their logs, he also found, were inconsistent with their timecards.

view Driver's daily logs for accuracy [and completeness] . . . control hours of service of drivers . . . utilize a system . . . to keep track of drivers total on duty time and driving activities for each 8 consecutive [day] period'' and ''utilize this information to ensure that drivers who are dispatched are not 'out of hours' or will not 'run out of hours.''' It also recommended that drivers be required ''to prepare a driver's daily log for every day of the week, *Including Off Duty Days*'' and ''insure that any driver who is 'on time cards' must be on duty *no longer* than 12 consecutive hours.'' (Emphasis in original.)

Lash claimed that McNalley recommended ''that I needed a lot or another location between Washington and the landfill and to run the drivers from Washington and the landfill and then drive it from the drop lot to the landfill.'' That recommendation is not among those set out in McNalley's report.[4]

Sometime in late summer or early fall, Lash called a meeting of his drivers to tell them of the ATA report and of his plans to deal with the hours issue. He announced that they would only be allowed to drive one trip per day, which would require that he hire more drivers. He also said that he was going to look for a drop site in Virginia, closer to the landfill. That, he promised, would allow them to go back to hauling two loads per day by the beginning of the next year. Lash told them that their routines would remain unchanged, that they would continue to pick up their tractors at Olive Street, and that new drivers would be hired in Virginia to haul from the drop site to the landfill.[5]

CWI eliminated the two per day runs and began to hire additional drivers in August. Thereafter, the drivers made one run per day, for the same $100, and worked 5 or 6 days per week. At some point, Lash sought help from BFI with respect to the possibility of creating an owner-operator relationship with the drivers and BFI undertook to find a trailer site closer to Washington, D.C.[6] BFI's efforts in this latter regard were unsuccessful. However, CWI acquired its own site in Central Garage, Virginia, in mid-December.

B. *Union Activity*

In late September, three of CWI's drivers, Alvin McElveen, Joe Nelson, and John Davis, contacted James Woodward, the Union's business agent. They discussed organizing Respondent's employees, each of them signed a card authorizing the Union to represent him for collective-bargaining purposes, and they took authorization cards and explanatory pamphlets for the other employees. Between September 26 and mid-October, they secured signed authorization cards from 29 other employees. Thirty-one card signers were drivers; the 32d was a tire man. The cards were turned back to Woodward in October.

In what appears to have been early November, driver Tarik Muhammad was refueling his truck upon returning to the yard when Lash called him over. Lash asked him, ''Who was causing the stink in the Company?'' Muhammad professed ignorance and was told, ''Well, your name has come up several times as one who was causing a stink.'' Muhammad denied that he had done so and Lash said that some of the men had gone to join the Union, that they could do as they pleased but that they ''weren't going to force him to do anything he didn't want to do.'' Lash repeated, several times, that he was surprised that Muhammad would be one to cause a stink and, when asked, defined ''stink,'' as ''guys going behind my back to join the Union.'' Lash told Muhammad that he had learned of this from Dino Sawyer. He spoke of how he had helped various employees and noted that Muhammad had written him a letter thanking him for a gift which Lash had provided while Muhammad was out sick. Muhammad denied that he was ''raising a stink'' and professed not to understand why signing a union card would be considered ''raising a stink.''[7]

C. *Demands for Recognition*

About November 9, Woodward called Lash and arranged to meet with him on November 15[8] at the union hall. In the course of their telephone conversation, Woodward told Lash that he represented a majority of CWI's employees in an appropriate bargaining unit.[9]

Lash did not show up for the meeting; his counsel, Joel Keiler, did. Woodward told Keiler that the Union represented a majority of Respondent's truckdrivers and asked to sit down and bargain for an agreement. Keiler responded: ''We'll never recognize the Union.''[10]

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[4] Lash purported not to recall whether McNalley had included that in his report or otherwise made this suggestion to him ''as one way of overcoming'' his problems. Respondent did not call McNalley to substantiate this significant hearsay testimony.

[5] Lester Baddy so testified, credibly and without contradiction. Lash recalled such a meeting in August wherein he promised the drivers that they would be back to two loads a day by the first of the year and asked them to ''hang with him.''

[6] The record does not indicate when Lash initiated this effort. A November 23 letter from BFI to Lash states that BFI's divisional vice president had asked BFI's counsel to work on acceptable owner-operator language and was expected to have such language ready in a few days. It also related that BFI was close to settling on a trailer storage site in Doswell, Virginia, after a previously selected site had failed to ''pan out.'' That new site would permit Respondent's drivers to ''comfortably get two loads per day and relieve many of the operational burdens you now face,'' the letter stated.

[7] Although he was somewhat confused about dates, Muhammad's testimony as to the substance of this conversation was credibly offered and stands uncontradicted.

[8] The difference between Woodward's recollection of the meeting as occurring on November 15 and Keiler's claim that it was on November 16 is inconsequential.

[9] At that time, Woodward was in possession of 32 authorization cards and Lash initially acknowledged that Woodward had claimed to represent a majority. I deem it inconceivable that Woodward, an experienced union organizer and business representative, would have told Lash, as Lash subsequently claimed, that ''he had somewhere around nine or ten, which would be the majority of the . . . old employees.'' I credit Woodward.

[10] Keiler, testifying in response to his own questions, asserted that Woodward only claimed that he could easily organize Respondent's employees and offered to show Respondent how it could avoid the DOT regulations if it signed a union contract. In the course of this conversation, according to Keiler, he allegedly told Woodward that Respondent was going to solve its problems by changing the drivers' status from employees to independent contractors or by moving the operations to a Virginia location closer to the landfill. I note that Lash had not claimed that, by that point in time, he was thinking of moving the operation to Virginia but only that he had been thinking of acquiring a Virginia drop site. I note further the improbability

Continued

D. *Lash's November Meeting*

Lash called his drivers together again about November 10. In the course of that meeting, he described the Company as a family and told the employees that someone was creating ''a stink,'' stirring up trouble in the family. He said that he believed that there was ''a devil amongst us.'' Lash did not mention the Union although his reference to ''creating a stink,'' the same words he had used in interrogating Muhammad, convinces me that he intended to convey his opinion of those who would organize for the Union by this statement. With respect to the problems caused by the distance from W Street to the landfill, Lash told the drivers that he was looking into setting the most senior of them up as owner-operators. He also mentioned his efforts to find a drop site closer to the landfill. Having such a drop site, he told them, would mean that not everyone would be able to continue driving but those who remained could go back to running two loads a day.[11]

E. *Surveillance of the November 19 Union Meeting*

A union meeting was held on November 19, at the Union's hall on 3100 Ames Place N.E., Washington, D.C. Before the meeting, several employees observed Duke Lash[12] with several other individuals at a car parked across from the hall. One of the others was Respondent's safety director, Chesha Gartmon. The employees pointed this out to Woodward who moved toward the car. As he did so, Duke Lash hastily jumped into the car and sped off. Shortly thereafter, he was again observed, now driving by at a high rate of speed.

That same afternoon, the employees saw Tony Lash drive by the union hall at least once.[13] As he drove by, he tooted his horn and waved. The employees waved back.

Lash does not deny driving by the hall on that day, or tooting and waving to the employees. He denied that he had gone there to spy on the employees. Rather, he claimed that the union hall lay on his route from the Olive Street facility to a delicatessen on Bladensburg Road where he ate lunch every day. On cross-examination, he corrected his testimony to a claim that, on that day, he had gone to a fast food restaurant across the street from the deli, as the deli was closed on Saturdays. Lash admitted that his son had acknowledged spying on the union hall.

F. *The Representation Petition*

On December 15, the Union filed its representation petition, Case 5–RC–14133, seeking an election among Respondent's Beaver Heights' based truckdrivers. A notice of hearing issued on that same day. At Keiler's request, the hearing was postponed to January 4 and, on that latter date, a Stipulated Election Agreement was signed. It provided for an election to be conducted at the Beaver Heights facility on February 3 in the following appropriate unit:

> All truck drivers employed by the Employer at its Beaver Heights, Maryland location; but excluding all other employees, guards and supervisors as defined in the Act.

G. *Acquisition of the New Site*

About mid-December, CWI contracted to purchase a 7-acre tract in Central Garage, Virginia, in King William County. On December 19, Lash wrote to the director of that county's community development office, seeking written confirmation that CWI's intended use of the property would be permitted under the prevailing zoning laws. He explained:

> Our intended use for this site would be for a Cargo Trailer Switching yard. Our interstate trucks would bring in and drop loaded trailers with solid waste and immediately return with empty trailers going north. We would then use local trucks to deliver the loaded trailers to the BFI landfill. This practice would allow our over the road trucks to make two trips per day where they are now able to make only one trip to the landfill.
>
> We will not be unloading, transferring or storing any materials on the ground.

The letter contains no mention of maintaining any office or service facility on that property.

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that Woodward would speak of the ease of organizing Respondent's workers in the future when he already had authorization cards from an overwhelming majority. I credit Woodward's testimony over that of Keiler, noting these inconsistencies and improbabilities as well as their comparative demeanors. While this credibility resolution is based on the record and testimony before me, I take administrative notice of *Frontier Hotel & Casino*, 318 NLRB 857 (1995), where the administrative law judge concluded, and the Board agreed, that Keiler ''has no credibility whatsoever. Even when he is testifying to matters not in serious dispute, one must mistrust him.''

[11] Drawing an accurate picture of both this and the subsequent meeting is difficult because the General Counsel adduced many witnesses on the subject; their testimony was somewhat conflicting and confusing as to the number and dates of meetings and exactly what was said. Both meetings, as I have described them, are compilations of the most credible and plausible testimony given by these employees. I have particularly relied on the testimony of Mark Barnes and Lester Baddy, both of whom impressed me as honest witnesses with better than average recollections of what had taken place. Only one employee, Stevenson, recalled that, before a November meeting, Dino Sawyer told the employees that Lash was going to speak to them about the Union and threatened that Lash would move his trucks to Virginia if they sought union representation. Stevenson also claimed, contrary to all of the other employees, that Lash repeated this threat. Stevenson's testimony was uncorroborated despite the presence of other employees when the alleged threats were made and was essentially disputed by Sawyer. It cannot be credited. I must similarly reject Sarah Thompson's recollection that Lash told them that ''there was a stink going on in the company about the union.'' She did not repeat the italicized words when she reiterated her testimony, those words are not included in her description of this meeting in her affidavit and no other employee attributed such a statement to Lash.

[12] Lash claimed that he had two sons who were known as ''Duke.'' The younger son, Sean Patrick Duke Lash (age 24), was purportedly the owner of CWI. The older (age 29) ''Duke'' had no role in the Company. The employees were unaware that there were two ''Dukes'' and therefore could not specify which one they saw. If the younger Duke was Respondent's owner, it is likely that he is the one with whom they were familiar.

[13] Sarah Thompson claimed to have seen him drive by as the meeting was breaking up, turn around at the end of the street and come by again. She placed this event in December and asserted that other employees were with her at that time. Her testimony as to Lash making a second pass by the hall has not been corroborated by any of the other employees.

H. *The December Meeting and Notice of the Move*

Lash spoke to his assembled drivers again on December 22. In this meeting, he told them that they had ''forced his hand.'' He could not help them buy or lease the tractors without continuing to be liable for them, he had been advised. He announced, however, that CWI had purchased property in King William County, Virginia, and would be moving the tractor-trailer division to that location in early January. After that move, they were welcome to continue working for CWI, but, in order to do so, would have to report for work at the Virginia site, where they would begin and end their workday. They would pick up the tractor and an empty trailer at that location, drive it back to the BFI lot in Washington, D.C. to be loaded with trash for a return trip to the landfill. After two such trips, they would drop the tractor and trailer at the Virginia site before their return commute to their homes. Each trip from the BFI lot to the King William County site in Central Garage would be about 100 miles. The drivers were given until December 28 to accept or reject the transfer.

This move, Lash said in his speech, would reduce his operating costs. Worker's compensation, unemployment, and other insurance, as well as taxes and rent, he claimed, were significantly cheaper in Virginia.[14]

Depending on where they lived in the Washington area, the employees' commute to Central Garage, Virginia, in King William County, would be 90 to 125 miles, each way. Lash claimed to have told them, ''It's not that much of a commute,'' asserting that he had drivers commuting to Washington from as far as 90 or 100 miles away at that time.[15]

In the course of this meeting, Lash also told the drivers that he was transferring part of his operation, or some of the trucks, to his son Duke, who would be hiring some of the drivers. He read off a list of drivers Duke was interested in hiring and promised those who were not hired, or who declined to commute in order to continue their CWI employment, good letters of recommendation.

At the conclusion of the meeting, Lash threw some papers down on the table, stating, ''Oh, this is about some election you all are supposed to be having.'' Thereafter, NLRB notices pertaining to the election were posted by the timeclock.

On the same day as this meeting, in a letter to Woodward, Keiler reviewed CWI's problems with respect to the drivers' hours and the reduction in the number of trips they could make each day. He stated:

> One of [Lash's] options was to purchase a transfer station near the landfill in Virginia.
>
> Mr. Lash's efforts over all these months have finally come to fruition and he has obtained the transfer station . . . . The transfer station site will be operational in January, 1995 and the drivers will be dispatched from the new location.

[14] Whether or not this is true has not been established on this record. Beyond Lash testifying that he told Woodward and the drivers that this was the case, and briefly alluding to alleged advice from his insurance agent, Respondent made no attempt to prove that there was a financial incentive to this move.

[15] No such drivers were identified on this record; none of the drivers who testified as witnesses for the General Counsel commuted more than about 25 miles.

Woodward dropped in on Lash at the Olive Street facility on December 28, after the events described above. He repeated his request for recognition[16] and warned Lash that his unfair labor practices were going to cost lots of money and cause lots of headaches. Lash's responded that he could not understand why his employees would want to be represented by a union. According to Lash, he told Woodward that CWI had to move because it would be cheaper to operate and allow him to comply with DOT regulations. He also claimed that he had been so advised by his accountants and lawyers and noted that the District of Columbia Government owed him a substantial amount of money.[17]

On December 31, Keiler protested that Woodward had bypassed him and met directly with the client. His letter stated, ''You again learned of the impending move. It is now scheduled to begin on January 3, 1995.''

I. *Terminations*

1. Richard Pace

Richard Pace was hired as a truckdriver in late July 1994.[18] Initially, he drove one trip each day, 6 days a week, from BFI's DC lot to the Virginia landfill. At some point, Sawyer put him on a different run, to Waverly, Mondays through Saturdays. In early November, Sawyer told him that they sometimes had extra trash requiring a run to Waverly on Sundays and that, if he took the Sunday run and there was less trash on Monday, he could have Monday off. There were Mondays on which, he claimed, he had either been reassigned to make a trip to King William County or sent home because there was no need for him to drive to Waverly.

Pace signed a union authorization card on September 30. Thereafter, he claimed, he was ''very vocal'' in favor on behalf of the Union, speaking to new hires and other employees, until he was terminated on November 18. In particular, he recalled rebutting statements which Lash had made in the November 10 meeting in the course of conversations with other employees which took place immediately outside Sawyer's office. He was not involved in the distribution of the authorization cards. No direct evidence of employer knowledge of his specific union activity, or of any antiunion statements made to or about him, was proffered.

Pace had been given a verbal warning for speeding on August 23. Respondent's records purport to show that he had unexcused absences on September 6, 8, 13, 22, 23, and 26, October 29 and 30, and November 7, 13, and 15. He had an excused absence on October 17. The records are ''Absence Report'' forms, signed by Sawyer. There is no indication that copies of the reports were given or shown to Pace although Lash claimed that he directed they be given to Pace and that

[16] I credit Woodward over Lash's denial that there was a repeated request for recognition.

[17] CWI's customer was BFI, not the DC Government. Lash admitted on cross-examination that the alleged debt from the District Government was unrelated to CWI.

[18] Respondent's records purport to show that he was hired on August 13. Pace credibly testified as to the basis for his recollection of the date (his purchase of tickets for a particular preseason football game with his first paycheck) and further testified that Respondent had called the drivers in to re-execute their hiring papers sometime after they were hired. I credit Pace.

he actually observed at least some of them being handed to Pace. With the exception of November 15, Pace does not dispute that he was absent, or that those absences were unexcused, on those dates.

On Saturday, November 12, Pace came in to drive a trash run to Waverly. To his observation, there was no trash to be run. His observation was confirmed for him by the operator who loaded the Waverly trucks. After securing Jerome Freeland's okay,[19] he left. Claiming that he did not have to work Sundays unless given a day's notice to do so, he did not report for work on November 13. Neither did he report on Monday, November 14. It appears, from the report of his absence on November 13 and from Sawyer's statement to him when he came in on November 15 (set forth below) that he had not been expected to return until November 15.[20]

When Pace reported to work on Tuesday, November 15, Sawyer told him that he was being suspended for 3 days for failing to show up for work on Saturday and Sunday. Pace disputed the claim that he had not shown up on Saturday and was told that Respondent had no knowledge that he had. As he prepared to leave, Sawyer called him back, told him that they had trash for him to haul, and changed the suspension to a written warning. Pace hurriedly signed, without reading, a warning for an unexcused absence and leaving work without permission. That warning describes the date of the incident as November 14; significantly, it reflects that this was ''Offense Number 1'' and the box which indicates whether the employee is probationary is not checked.

Pace worked on November 15, 16, and 17. On November 18, he was called into Sawyer's office and told that he was being terminated because he had not ''made his 90 day probation.'' They disputed whether he had been hired on July 29, as Pace claimed, or August 13. At that point, according to Pace, Sawyer claimed that the probationary period referred to 90 working days. Pace protested that he had never been advised of a probationary period and Sawyer told him that he was terminated. ''You didn't make your 90 days. That's the excuse,'' Sawyer said.

Nothing had been said to Pace concerning a probationary period when he was hired. Indeed, Respondent had no established probationary period for new employees. In response to a subpoena calling for any written statements of policy, Lash asserted that CWI had ''No policy. We hire at will.'' Similarly, Sawyer testified that, as there was nothing in writing, the probationary period ''could be whatever you chose it to be.''

Sawyer testified that ''every time something went down pertaining to Mr. Pace . . . [I] reported to Mr. Lash.'' However, he gave Lash no written reports on Pace until November 18. On that date, he prepared an ''Attendence [sic] Report'' stating that Pace had begun his employment on August 13, 1994, that ''his 90 day probationary period exceed [sic] to November 13, 1994 and Mr. Pace had been unexcused for Eleven days in which this period occured [sic].'' That report was allegedly placed in the personnel director's folder.[21] Sawyer did not make the decision to discharge Pace; he claimed that Lash did so. Lash neither corroborated nor contradicted this testimony.

Under the date of November 18, Sawyer also wrote out and signed a memorandum which asserted that Pace's ''Application came up for his 90 day Review'' on November 16.[22] According to that memo, the personnel department and Sawyer found Pace ''below exceptance [sic],'' noting verbal warnings for his performance and his absenteeism. As a result of that review, it states, ''Pace was asked to leave the Company.''

2. January termination of the drivers

In early January, Respondent moved the driver's reporting location to Central Garage, Virginia, as Lash had said he was going to do on December 22. Thereafter, if they were going to continue their CWI employment, the drivers would have

[19] The General Counsel contended that Freeland was a statutory supervisor, with authority over the local drivers. The only evidence so indicating is November 10 memorandum to the drivers respecting the reporting of injuries, which labels Freeland as the ''immediate supervisor'' of the ''roll-off, rear-end and front-end drivers,'' his $1000-per-week salary which is the same as that of admitted supervisor Dino Sawyer, and some evidence that he might have acted as a dispatcher for the local drivers. There is no evidence that he possessed or exercised any of the statutory attributes of supervision. Respondent denied that Freeland possessed supervisory authority and attributed his substantial salary to the long hours he worked as Lash's assistant. I am constrained to conclude that, while the General Counsel's evidence raises suspicions, it is insufficient to sustain its burden of proof on the supervisory issue. See *Valley Mart Supermarkets*, 264 NLRB 156, 158, 163 (1983). For that reason, I have not discussed allegedly coercive statements attributed to Freeland.

[20] According to Freeland, Sawyer came in to the office on November 12 and asked why a truck was sitting in the yard. Freeland told him that Pace had left it. At Sawyer's request, Freeland allegedly prepared a memorandum regarding Pace's actions on that morning. The memorandum relates that Pace had come into the office, questioned whether the other employees had gotten a late start because he did not see his tractor in the yard, then walked out of the office, stood around the yard for a few minutes, and left without further discussion, never taking his load to the dump. I credit Pace's recollection of the events of that morning. Other than identifying this memorandum, Freeland was not asked to describe, and did not describe, Pace's conduct, despite my express direction that Respondent's counsel proceed in that manner. Neither did Freeland claim that he had no present recollection of the events of that morning; thus, Respondent cannot contend that the memo represents Freeland's past recollection recorded. Nor can it contend that this is a record prepared in the regular course of business. Respondent asserted that Freeland had no authority over the drivers and this is the only time that Freeland had prepared such a memorandum or report. Moreover, I find that Freeland's memorandum is, at best, of questionable legitimacy. The version introduced as R. Exh. 10 is typed and dated ''11/18/94,'' the day of Pace's discharge. Freeland claimed that he initially gave Sawyer a handwritten note and, at Sawyer's request, typed it over. Sawyer then typed it a second time, Freeland claimed, because ''[i]t didn't look too good.'' It is this second typed version which Respondent introduced. Freeland could not recall when he wrote or signed the memo. It is entitled to no probative weight.

[21] Although Sawyer claimed that he prepared such reports on other employees, the record is devoid of any examples.

[22] In the handwritten version, ''Nov. 16, 1994'' is written over what appears to have been ''Nov. 18, 1994.'' Both the handwritten version, and the original of a typed version, were received in evidence. The syntax of the memorandum and the fact that Respondent had retained the originals of both versions, tend to indicate that this document was never given to Pace as a discharge letter, as Keiler's questions and Sawyer's responses implied.

to begin and end their workdays at the King William County transfer site rather than in Beaver Heights, Maryland.[23]

At some point in time, Respondent posted two help wanted notices. One announced that Duke Lash would be hiring tractor-trailer drivers on January 3, 1995, and directed interested drivers ''to see Duke on Tuesday.'' The second notice sought tractor-trailer drivers for runs between Central Garage and Washington, D.C. (two loads a day at $70 per load, 5 or 6 days a week) and other drivers to run between Central Garage and the BFI landfill in King and Queen County (four loads a day at $35 per load, 5 or 6 days a week). It offered fully paid health insurance, six paid holidays, 4 days' sick leave, and future implementation of a 401(k) pension plan and directed applicants to contact ''Valerie Cooper/Personnel Manager.'' No employer is named thereon but a Maryland telephone number was given; it may have been posted at a gas station/food mart near the Central Garage site, where Barnes recalled seeing it.

Through at least May 1995 (when Mark Barnes quit), Respondent maintained no facilities at the transfer station. That site consisted of an open lot with rocks and a strip of concrete to keep the trailers from sinking into the mud. At all times, Respondent retained its administrative offices at Olive Street and continued to perform its payroll functions there. While the drivers had punched a timeclock at Olive Street, the Central Garage site had no timeclock. At some undisclosed point in time, Respondent set up a double wide trailer as an office and drivers' room in Central Garage, staffing it with one office employee and designating one driver to receive calls from other drivers who were unable to report for work. That office is now equipped with telephone, fax, and copy equipment and, purportedly, the employees' records are now kept there. Some mechanical work may also be done there. Lash spreads his time between Olive Street, W Street, and the transfer station. He either visits the BFI site in D.C. and calls to the transfer station with information as to the number of drivers required or, if he is at the transfer station, calls BFI for the information and passes the information to the men.

With the exception of Mark Barnes, none of Respondent's drivers followed their jobs to the Central Garage, Virginia site. While at least some (and possibly all) of the employees were told that they could apply to work out of Central Garage, some received notices of lay off. Thus, Charles Gentry did not tell anyone that he wanted to follow the work to Central Garage; he was called by Lash in late December and told that he was no longer a CWI employee. Anthony Hicklin attended a meeting with about three other employees when Sawyer told them that they were laid off; Hicklin denied having been told that he could commute if he wanted to. Muhammad attended a similar meeting about January 15. He asked Lash why they were being let go ''because of the Union,'' and was told again that his name had come up as one ''who was raising a stink.'' Lash told him that he was letting everyone go. Sarah Thompson was given a layoff slip, dated January 9, stating that she had been laid off ''due to unforeseen circumstances.'' Joe Nelson had been told, before Christmas, that Sawyer ''had to lower the boom'' on him and that he was being denied work for which he had already been scheduled. Nelson was later called by Lash, in mid-January, and told that he was being let go as CWI didn't need him any longer. Lash told Nelson that ''his back was up against the wall here and he had to do it.'' Around the same time, John Davis was called and told that CWI had already hired drivers and that he was laid off. Significantly, when Sawyer called Carl Stevenson during the second week in January to tell him that he was terminated, Sawyer said that Stevenson he had been seen at the union meeting and was named on a list of those who could no longer be employed by CWI.[24]

Lester Baddy initially said nothing to Lash about his willingness to commute. However, in mid-January, when he learned that Barnes was going to make the commute, he told Lash that he could ride with Barnes and would be able to follow his job. Lash told him that he was too late, that others had been hired at the Central Garage end.

Respondent's records reveal that the following 38 CWI drivers were terminated between January 4 and 17:[25] Ken Covington, Kenneth Watson, Zonnie Peterson, John Davis, Orlando Bartee, Alvin McElveen, Charles Gentry, Elden Carrington, Irving Long, Charles Hubert, Joe Nelson, John Fort, Lester Baddy, Marilyn Bartee-el, Sarah Thompson, Stephen Alper, Tarik Muhammad, William Skinner, Andre Young, Dale Brown, Ennis Moore, James Proctor, Wyatt Vailes, John Marshall, Edward Hall, Eric Griffin, John Douglas, Wade Shields, Anthony Hicklin, Carl Stevenson, Daniel Ross, Donald Dasse, Joel Brown, Thomas Henson, Fred Sewer, James Daley, Marvin Sanders,[26] and Morris Redmond.[27]

Respondent hired at least 20 drivers from early January through February 1995. Others were hired later after some of the initial hires terminated their employment.

3. Mark Barnes

Mark Barnes, who had begun driving for CWI in December 1993, was the only driver who commuted to Central Garage in order to retain his job. The change extended his commute from 2 or 3 miles to 125 miles, each way.

When Barnes observed that there were still some drivers who began their workdays in the Washington, D.C. area, he made repeated unsuccessful requests that he be allowed to drive from the D.C. end. In February, Lash told him that it was not possible at that point, that the Union was still making noises and that he would let Barnes know later. In April, he repeated his request and Lash responded that there were ''still things going on that he had to resolve . . . with the union . . . that he had talked to his attorney . . . that it wasn't possible with the Union still keeping things going.''

[23] Barnes testified that after he began driving from the drop site, he observed several employees who were continuing to start their workdays in the Washington, D.C. area. Those he named, however, appear from Respondent's records to have been terminated on either January 4 or 9 and are included among those found herein to be discriminatees.

[24] Stevenson's testimony was credibly offered and stands uncontradicted. Stevenson had been named as among those eligible to be hired by Duke and submitted an application for that job. However, he heard nothing further.

[25] I have omitted those drivers hired in January who worked only a few days.

[26] It is unclear whether Sanders was a driver.

[27] Although the records show that Redmond was terminated in January 1994, this appears to have been a typographical error inasmuch as his name appeared on the *Excelsior* list.

Lash said that ''he would hold it up in court and . . . that nobody was going to get any money.'' In a separate discussion, when Barnes had raised the same question, Lash told him that he had been a union man for 20 years, that he and his wife had everything they owned in the Company, and that he was not going to let ''the Company go under because somebody wanted to start a union.'' Lash described the process of an NLRB proceeding, acknowledging that he would probably lose but stating that his lawyer could keep it tied up in court for years, after which he would declare bankruptcy. ''Nobody,'' he said, ''would get shit.''[28]

In May, Barnes learned from Freeland that drivers were being hired for the city roll-off trucks; Freeland offered to train him to drive one. Barnes then spoke to Valerie Cooper, the personnel manager, who referred him to Sawyer. Sawyer told Barnes that ''he couldn't allow me to drive any truck for CWI on this end, because he would have to hire everybody back because of the problems that it would create with the Union.''[29]

Barnes finally quit Respondent's employ in May. The 250 miles per day he was commuting, on top of his daily driving duties, working 6 and 7 days a week, had left him exhausted. He found other driving work requiring him to commute less than 25 miles.

J. *Analysis*

1. The 8(a)(1) and animus

The complaint, as amended at hearing, alleges that Lash's comments to Muhammad in early November, questioning which employees were ''causing the stink in the Company'' by going behind his back to join the Union, his reference to Muhammad as one who had been reported to him as ''causing a stink'' and his similar ''stink'' and ''devil amongst us'' statements (without express reference to the Union) in the November meeting, created the impression that the employees' union activities were under surveillance, in violation of Section 8(a)(1). I find these allegations to be well founded. At the points in time when he made such statements, the employees' were not openly engaging in their union activity. For Lash to indicate his awareness of it, and particularly for him to tell an employee that ''his name had come up'' as one engaged in it, clearly implies that Respondent was surreptitiously observing the protected activity or had a spy who was reporting back to him on it. *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993).

I also find that Lash unlawfully interrogated Muhammad as to his own union activities and those of other employees. As noted, Muhammad's union activities had not been openly engaged in and Lash, as Respondent's highest operating official, directed the query at this employee while reminding him that he had been the recipient of the Employer's generosity when disabled by illness and in the context of both negative remarks concerning such activity and of the futility of such activity. I find the circumstances of this interrogation to be sufficiently coercive to warrant that if be found in violation of Section 8(a)(1). *Basin Frozen Foods*, 307 NLRB 1406, 1414–1415 (1992).[30]

I further find that, by the conduct of Tony Lash and Duke Lash on November 19, outside the union hall, Respondent surveilled and created the impression of surveillance of the union meeting. Even if, as Lash claimed, his presence outside the hall as the meeting was ending was merely fortuitous,[31] he knew that the building from which the employees were exiting was the union hall and he called attention to himself as he drove by. It is irrelevant whether Respondent intended to interfere in their union activities. As the Board stated in *Waco, Inc*., 273 NLRB 746, 748 (1984):

> It is too well settled to brook dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct can reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. [Citing *Daniel Construction Co*., 264 NLRB 569 (1982).]

Here, the employees saw both Tony Lash and his son separately observing them while they engaged in protected union activity. Tony Lash even focused their attention on his presence by blowing his horn and waving. The union meeting was held at a considerable distance from the Employer's facility and had not been openly announced. The employees had the right to expect that they could attend without exposing their union activities to Respondent. Respondent's observations of them interfered with that expectation. I note that Lash never told the employees that he had not intended to spy upon them, or that he had not intended that his son do so. Indeed, in terminating Carl Stevenson, Sawyer noted that he had been seen at the union meeting. In these circumstances, one cannot conclude, either from the allegedly fortuitous nature of Lash's presence outside the union hall or from the fact that the employees returned Lash's wave, that his appearance there lacked the tendency to coerce them.

The General Counsel's second complaint (Case 5–CA–25116) alleges that, on or about December 23, Dino Sawyer threatened to ''lower the boom'' on employees. The credited evidence reflects that he told Joe Nelson that he had to ''lower the boom'' on him and deny him work for which he had already been scheduled, for reasons purportedly unknown to Sawyer. As discussed more fully with respect to the 8(a)(3) allegations, it is clear that the employees were,

[28] I credit Barnes over Lash, noting in addition to their demeanor, that Lash did not deny most of the specific statements Barnes attributed to him. Rather, his denials were carefully framed so as to dispute the narrow language of the complaint allegations, not the employee's testimony.

[29] Based on my observation of the witnesses, I credit Barnes over Sawyer, who denied making this statement.

[30] The wording of the General Counsel's motion to amend, and the fact that it was made immediately on the conclusion of Muhammad's testimony, make clear that it was intended to cover this conversation. To the extent that it fails to specifically allege unlawful interrogation or the threat of futility, I note that Muhammad's testimony clearly raised the issues and the complaints allege other statements as threats of the futility of union activity. I deem these issues to have been fully litigated and therefore appropriate for findings of violations. *J. T. Slocomb Co*., 314 NLRB 231 (1994); and *Mine Workers District 29 (Boich Mining)*, 308 NLRB 1155, 1159 (1992).

[31] Lash's explanation is neither wholly incredible nor wholly implausible. While I am suspicious of his motivation, I cannot discredit him with respect to it.

at that point, in the process of being discriminatorily discharged, thus explaining the reference to ''lowering the boom.''

Similar, but more explicit, statements were made to Barnes in February, April, and May by both Sawyer and Lash. They rejected his requests to start his workday in the Washington, D.C. area because of the Union's continued presence. I find all of these statements violative of Section 8(a)(1), as alleged in the complaint. To state or imply that reprisals were being taken against employees based on union considerations unmistakably interferes with, restrains and coerces employee union activities. *Emergency One*, 306 NLRB 800, 806 (1992).

Finally, with respect to the 8(a)(1) violations, the complaints allege that in April, Lash repeatedly threatened that the union activities would be futile. The evidence establishes that Lash told Barnes that he would keep the proceedings tied up in court, that no one would get any money even if he lost because he would declare bankruptcy, and that he would not allow the Company to go under just because someone wanted to start a union. Such statements, I find, unlawfully convey the threat of futility, in violation of Section 8(a)(1). So, too, did Lash's statement to Muhammad in early November, to the effect that the employees ''weren't going to force him to do anything he didn't want to do.'' *Sivalls, Inc*., 307 NLRB 896, 1001 (1992).

2. Section 8(a)(3)

a. *Analytical mode*

Wright Line, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning on the employer's motivation. Under that test, the General Counsel must first:

> make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted. *Fluor Daniel, Inc*., 304 NLRB 970 (1991).]

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co*., 303 NLRB 638, 649 (1991). Evidence of suspicious timing and false reasons given in defense support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp*., 305 NLRB 219 (1991); *Visador Co*., 303 NLRB 1039, 1044 (1991); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

Once the General Counsel has made out a prima facie case, the burden

> shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected union activity. An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. Furthermore, if an employer does not assert any business reason, other than the one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason. [Citations omitted. T&J Trucking Co., 316 NLRB 771 (1995).

The *Wright Line* analytical mode is applicable to all of the allegations of discrimination involved here.

b. *Richard Pace*

The General Counsel has made out a prima facie case with respect to Pace, albeit not an overwhelmingly strong one. Pace was involved in the union activities, as a participant if not as a leader. Respondent was aware of the employees' union activity in general, if not of Pace's individual participation, and bore animus against that activity. Moreover, Pace's discharge came 1 day before a scheduled union meeting of which Respondent apparently had notice[32] and in the week following the Union's demand for recognition. This evidence is sufficient to shift the burden to Respondent.

Respondent has failed to sustain the burden thus shifted to it. While it has shown that Pace had a somewhat dismal attendance record, it had tolerated that absenteeism throughout his employment without issuing any warnings or other discipline. It failed to demonstrate that other employees had better records or that it had a practice of discharging employees for similar absenteeism. Most significantly, it put forth a clearly specious defense based upon a nonexistent probationary period policy and created documents to support the discharge. Moreover, it failed to produce any probative evidence of Pace's alleged misconduct on Saturday, November 12, and essentially condoned his alleged failure to work on that Saturday or Sunday when it waived the suspension, issued a first warning to him and allowed him to work for the next 3 days. Accordingly, I find that Richard Pace was discriminatorily discharged in violation of Section 8(a)(3). See *Trader Horn of New Jersey*, 316 NLRB 194, 198 (1995), wherein it is noted that the manner and timing of a discharge may warrant inferences of both knowledge and animus and strongly support a prima facie case.

c. *Constructive discharges*

When Respondent changed the drivers' daily reporting site from Beaver Heights to Central Garage, Lash told them that if they wanted to retain their jobs they would have to commute to that new site, a distance of up to 125 miles. They

[32] See the discussion of surveillance and creating the impression of surveillance, supra.

were given less than a week to decide and to make arrangements for the extended commute. Only Barnes accepted that challenge (other than Baddy, who sought to continue his employment, as discussed, infra). The remaining drivers were all terminated.[33] There is no question but that that it was the lengthy commute which prevented them from following their jobs and that they would not have been terminated were it not for the choice Respondent placed before them. The General Counsel contends that by requiring the employees to make such a choice, Respondent constructively discharged these employees.

The Board holds that a constructive discharge has been made out when the General Counsel shows that:

> (1) the employer established burdensome working conditions to cause the employee[s] to resign and (2) the burden was imposed on the employee[s] because of [their] protected activities. *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976); *Algreco Sportswear Co*., 271 NLRB 499, 500 (1984).

La Favorita, Inc., 306 NLRB 203, 205 (1992). Here, employees whose work required them to drive heavy tractor-trailers for as much as 10 to 12 hours per day, covering approximately 400 or more miles, were placed in a position wherein they would have to drive as much as an additional 250 miles, and for an additional 4 to 6 hours, each day in order to simply get to and from work. I have no doubt but that such a burden rises to the level where their working conditions became ''so difficult or unpleasant as to force [them] to resign.'' *Crystal Princeton Refining Co*., supra. It is noteworthy that the burden Respondent sought to place upon them would have required them to drive more hours per day, on and off duty, than the DOT regulations would permit them to drive while on duty. Respondent's changed working conditions thus created a situation which was dangerous, both to the drivers and to others on the highways, in addition to being difficult or unpleasant.

The questions which must be resolved is whether Respondent imposed this burden on its employees in order to force them to quit and because of their union activities. The answer to both of these questions is unequivocally ''yes.'' Thus, while Lash expressed his intention to acquire or utilize a drop site in Virginia before the advent of the union activity, he initially planned to maintain the drivers' starting point in the Washington, D.C. area. He told them so both expressly, as related by Lester Baddy, and implicitly, by promising that he would return to two loads a day and asking that the drivers ''hang with him.'' As late as December 19, when he described the intended use of the King William County site to that County's community development office, he made no mention of basing the tractors and trailers there. He told the director of that office just the opposite, that the tractors would ''immediately return with empty trailers going north'' and he said nothing about maintaining an office or other facility on that site. Indeed, that site was a bare lot, with no facilities, for many months after its utilization began.

Moreover, Lash implicitly admitted that his motivation was the employees' union activities when, in the December meeting, he told them that they had ''forced his hand'' or ''had his back to the wall,'' as several employees credibly recalled. The only thing ''they'' had done was to seek union representation. The statements of both Lash and Sawyer, denying a reassignment to Barnes when he sought to drive from the D.C. end, basing their refusal on the continued presence of the Union, is further evidence of the unlawful motivation. So too is Lash's explanation to Muhammad that he was being laid off because his name had come up as one who was ''raising a stink.''

Most persuasive here is Respondent's failure to sustain its burden of establishing that it would have taken the same steps if the Union had not been in the picture. The move was not essential to the goal of permitting drivers to make two trips per day. Indeed, given the extra driving the move would entail, with the resultant fatigue and danger to the drivers and to others on the highway, it was contraindicated. The two trips per day goal was more easily and certainly more safely achieved by continuing the practice of the drivers reporting to and picking their tractors up at Beaver Heights at the start of the day, making two round trips between the BFI lot and the drop lot in Central Garage, and then dropping the tractors back at Beaver Heights at the end of their workday.

Lash told Woodward and the drivers that the new arrangement was more economical and that he had been advised to undertake it by his lawyers and accountants, thus implying an economic motive for the move. Respondent offered no probative evidence of such recommendations and no evidence that his costs would be less in Virginia. In fact, beyond Lash's testimony of what he told Woodward and the employees, and an off-hand comment that his ''insurance man'' told him ''how much cheaper his insurance would be'' if the trucks were parked overnight in Virginia, Respondent never even made such a claim on this record.[34] His bare and self-serving assertions are insufficient to carry Respondent's burden of proving such motivation and Respondent's failure to adduce such evidence, which would have been readily available if it existed, warrants an inference that no such evidence exists. I may not find that the burden of persuasion has been met based upon conjecture.

Respondent has failed to sustain its burden of refuting the General Counsel's prima facie case. I, therefore, find that Respondent's move of the driver's reporting location was discriminatorily motivated and that it made the drivers' working conditions so difficult, unpleasant, and dangerous as to force them to quit. By doing so, Respondent constructively discharged those 38 drivers, in violation of Section 8(a)(3).[35]

[33] While I have discussed these discharges in the context of constructive discharges, the record reflects that Gentry, Hicklin, Muhammad, Thompson, McElveen, Davis, Nelson, and Stevenson were all told, expressly, that he or she was being laid off let go. They may be considered to have been directly discharged.

[34] Lash's claim that the move would save him rent appears to be both false and unsupported. CWI maintained its Beaver Heights facilities after the move. It thus incurred the same expenses at that site while adding the cost of acquiring and maintaining the Central Garage site. His claim that the move was somehow related to a debt from the District of Columbia Government was an attempt to rely upon an irrelevancy. CWI did not work for, and was not owed money by, that governmental entity. That debt, if it existed, related to another business to which Lash was somehow connected.

[35] Where, as here, the discriminatory motivation for a mass discharge is clear, it is not necessary to establish the union activity of each discharged employee. *Davis Supermarkets*, 306 NLRB 426

I would note further that, with respect to Lester Baddy, Respondent's conduct was even more direct. Baddy had initially indicated, by his inaction, that he would not be following his job to Central Garage. However, when he learned that he could secure transportation with Barnes, and asked to continue his employment, Baddy was told that he was too late. At that point in time, and for months thereafter, Respondent continued to hire new drivers. It never explained why Baddy was ''too late'' or how Respondent might have been prejudiced by continuing to employ or by re-employing him. I find, for this additional reason, that Respondent dis-criminatorily fired and refused to rehire Lester Baddy. Respondent's refusal to accommodate Baddy in this way, I also find, is further evidence of its discriminatory motivation toward the drivers group as a whole.

d. *Mark Barnes*

Mark Barnes endured the 250-mile daily commute for about 5 months, trying repeatedly but unsuccessfully to be reassigned back to his original work location. Each time he was rejected, he was reminded of the discriminatory nature of the reassignment, Finally, exhausted by the commute, he quit. Does the fact that he made every effort to keep working, despite his Employer's attempts to force him out, work to his detriment once he finally gave in? I do not believe so. That he suffered the discriminatorily imposed change for as long as he could does not make it any the less burdensome, difficult, or unpleasant. I find that he was constructively discharged in violation of Section 8(a)(3).

3. Section 8(a)(5)

a. *Gissel bargaining order*

The Union's majority status, 31 or 32 valid authorization cards in an appropriate unit of Respondent's drivers,[36] consisting of approximately 44 on the critical date, is clear.[37] Moreover, I have found that the Union demanded, and the Employer refused, recognition and bargaining on November 15. The question is thus whether Respondent's unfair labor practices warrant imposition of a bargaining order remedy under the authority of *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

As this administrative law judge stated in *B & P Trucking*, 279 NLRB 693, 702 (1986):

> In *Gissel*, the Court held that the Board could require an employer to bargain with a union based upon a card majority (without an election) in two types of cases. The first category, *Gissel I*, were those ''exceptional'' cases in which the employer committed ''outrageous'' and ''pervasive'' unfair labor practices of ''such a nature that their coercive effects cannot be remedied by the application of traditional remedies with the effect that a fair and reliable election cannot be held.'' *Gissel II* encompasses those ''less extraordinary cases'' in which the employer has committed ''less pervasive'' unfair labor practices which still have the tendency to undermine majority strength and impede the election process. In the latter situation, the Court stated, a bargaining order should issue when the Board finds that the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that the employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. [395 U.S. at 613–615.]

In that case, the unfair labor practices consisted of interrogation, threats that the business would close, and the discriminatory closing of a portion of the business with the resultant termination of all unit employees. Those violations, which closely parallel Respondent's conduct here, were ''hallmark'' violations which, because of their seriousness and the fact that they represented completed actions, ''justif[ied] a finding [that a bargaining order is warranted] without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force.'' *Horizon Air Services*, 272 NLRB 243 (1984), enfd. 761 F.2d 22 (1st Cir. 1985), adopting the language of *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980). As I noted in *B & P Trucking*, supra, in language fully applicable to the instant case, ''It would be difficult to envision any case which more clearly warrants imposition of a *Gissel* bargaining order . . . . The unfair labor practices, I believe, place this case within *Gissel I*; unquestionably this conduct comes within at least the second category of *Gissel* and requires a bargaining order.'' I concluded there, as I conclude here, ''that Respondent's misconduct was so serious and final as to compel a finding that the possibility of erasing its effects

(1992). Counsel for the General Counsel asserts that there may have been as many as eight more employees terminated in this mass discharge, the eight whose names appear on the *Excelsior* list but not on the payroll. If they were employed as drivers before January 3 and were caught up in this mass discharge, they should appropriately be considered as discriminatees. I shall leave this determination to the compliance phase of this proceeding. I also leave for compliance the determination as to the effect on available work of Respondent's transfer of work or trucks to an operation to be run by Duke Lash.

[36] A unit limited to drivers is appropriate whether or not there were other appropriate units. *Laidlaw Waste Systems v. NLRB*, 934 F.2d 898 (7th Cir. 1991). Here, of course, Respondent had stipulated to the appropriateness of this unit; Keiler signed the stipulation on behalf of CWI. It is immaterial that an employee elected to conduct his organizational activities among this single and most receptive class of employees rather than a broader grouping which might also have constituted an appropriate unit. Respondent also asserts that the complaint alleges a different unit as appropriate, one which includes the drivers employed at Respondent's Washington, D.C., and Virginia locations as well as those employed at Beaver Heights, Maryland. There is no indication in this record that CWI employs any drivers in Washington, D.C., and, as I have found that the Virginia location was a discriminatory relocation of the Beaver Heights, Maryland-based drivers, the variance between the unit stipulated to and that pleaded as appropriate in the complaint is immaterial.

[37] The *Excelsior* list provided by Respondent listed 46 employees purportedly eligible to vote as of December 28. Of these, eight were not on Respondent's payroll between September and December or, for that matter, at any later date. At least two employees (Shields and Moore) who were on the payroll at the critical times were not listed on the *Excelsior* list. The Union's majority is solid even if those few cards which were at all questionable (Marilyn Bartee-el—returned by her husband; Dasse and Hall—not fully or properly dated) and the tire man were to be eliminated. At all times, the Union had valid cards from at least 28 drivers; at no time did the unit approach 56 employees.

and ensuring a fair election by traditional remedies is, at best, slight.''

I noted in *B & P*, supra, as I note here, that all of the unit employees were vitally affected by the unfair labor practices, that those unfair labor practices were committed by high-level supervision, including Respondent's president, and that it was likely, from the fact that the discharges took place even before the employees voted for union representation, that Respondent would commit further violations to forestall their free participation in an election. I also noted there, as I note here, that there were no circumstances mitigating the serious nature of the violations. I also take note here that Respondent continued to commit unfair labor practices until it rid itself of the last driver remaining from among those who supported the union activity. It repeatedly denied Barnes a reassignment back to the prior driving arrangement, reminding him each time that it was the union activity which prevented such a reassignment. Such continued misconduct does not bode well for the efficaciousness of a mere cease and desist order.

The Board, in affirming my findings and conclusions in *B & P Trucking*, supra at 692, stated:

> In light of the violations found, we conclude that the possibility of erasing the effects of Respondent's unfair labor practices and of conducting a fair election by use of traditional remedies is slight. Requiring the Respondent simply to refrain from such conduct will not eradicate the lingering effects of the violations. Correspondingly, an election will not reliably reflect genuine, uncoerced employee sentiment. Thus, we conclude that the employees' representation desires expressed here through authorization cards would, on balance, be better protected by our issuance of a bargaining order . . . .

Similarly, in *Cell Agricultural Mfg. Co.*, 311 NLRB 1228 (1993), the Board found a *Gissel* bargaining order warranted where the employer laid off the entire unit shortly after the first union meeting, failed to reinstate three members of that unit, and then granted wage increases to 8 of 33 unit employees.[38] It noted that such unfair labor practices, which ''constituted 'hallmark' violations, directly and immediately affecting every member of the unit . . . particularly require a remedial bargaining order.'' See also *Central Broadcast Co.*, 280 NLRB 501 (1986).

The Union achieved its majority status by mid-October, by which time Respondent had already commenced upon its course of unlawful conduct. The Union, however, made its demand for recognition on November 15 or 16, 1994. It is therefore at this latter date that Respondent's bargaining obligation arose. *Trading Port, Inc.*, 219 NLRB 298, 301 (1975). See also *Waste Management of Utah*, 310 NLRB 883, 910 (1993), and *Central Broadcast Co.*, supra. at fn. 4.

b. *Refusal to bargain over the effects of the move to Central Garage*

The General Counsel asserts that Respondent's failure to bargain over the effects of the move of the driver's reporting location from Beaver Heights, Maryland, to Central Garage violated Section 8(a)(5). While I am inclined to agree (pondering why a refusal to timely notify and bargain over this decision as well as the decision to transfer a portion of the operations to his son, Duke, who was purportedly the owner of CWI, was not also alleged),[39] I find it unnecessary to reach this issue. The remedy for such a violation would be superfluous in light of the findings that this action, and the resultant termination of all of the drivers in that unit, violated Section 8(a)(3) and that a *Gissel* bargaining order is warranted. *Central Broadcast Co.*, supra at fn. 6.

K. *The Representation Case*

1. The election

Pursuant to the Stipulated Agreement entered into on January 4, the election was conducted on February 3. Of approximately 46 eligible voters, only 13 showed up to vote. Three voted against representation and 10 were challenged by the Employer on the basis that they were not employed at the time of the election. The challenged ballots were sufficient to affect the results of the election.

2. The challenges

The 10 challenged voters, Lester Baddy, Orlando Bartee, John Davis, Alvin McElveen, Joe Nelson, William Skinner, Sarah Thompson, Dale Brown, Marilyn Bartee-el (also challenged by the Board agent), and Charles Gentry Jr., were all employees discharged in violation of Section 8(a)(3). They remained employees and are, therefore, eligible voters whose ballots should be opened and counted. I shall direct that this matter be remanded to the Regional Director, who shall count those ballots and issue a revised tally of ballots. Should the revised tally show that a majority of votes has been cast for the Union, the Regional Director for Region 5 shall then issue a certification of representative. The Union is entitled to both the *Gissel* bargaining order and the benefits of certification. See, for example, *Airtex*, 308 NLRB 1135, 1137 (1992).

3. The objections

The Union's objections, alleging the termination of the drivers in order to defeat unionization and the threat to ''lower the boom'' on them, parallel two of the unfair labor practices found herein. As unfair labor practices, they are also objectionable conduct warranting that the election be set aside. I shall therefore order that, in the event that the revised tally of ballots establishes that a majority of the valid votes were not cast for representation, the election be set aside.

[38] While not alleged as a violation herein, I note that Respondent's flyer, seeking replacement drivers, promised the institution of a pension plan, an action akin to granting a wage increase.

[39] I note that Keiler had earlier rejected the Union's demand for recognition and bargaining and his December 22 letter presented Woodward with a fiat accompli. Thus, a demand to bargain over the decision after that would have been futile. Woodward did, in effect, demand to bargain over the effects when he spoke with Lash on December 28, protesting the decision. My conclusion would be the same were I to address this issue as one of a unilateral change, as asserted in counsel for the General Counsel's brief, rather than as a refusal to bargain over effects, as alleged in the complaint.

CONCLUSIONS OF LAW

1. By interrogating employees, by engaging in surveillance and creating the impression of surveillance, by threatening employees with reprisals for their union activities or telling them that their union activity would be futile, and by telling employees that they were being terminated or denied reassignment because of their union activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging employees because of their union activity, the Respondent has violated Section 8(a)(3) and (1).

3. The following unit is appropriate for the purposes of collective bargaining:

> All truck drivers employed by the Employer at its Beaver Heights, Maryland location; but excluding all other employees, guards and supervisors as defined in the Act.

4. By failing and refusing to recognize and bargain with the Union as the exclusive representative of the employees in the unit set forth above since November 15, 1994, Respondent has violated Section 8(a)(5) and (1).

5. Lester Baddy, Orlando Bartee, John Davis, Alvin McElveen, Joe Nelson, William Skinner, Sarah Thompson, Dale Brown, Marilyn Bartee-el, and Charles Gentry Jr. were eligible to vote in the election conducted on February 3, 1995, in Case 5–RC–14133. Their ballots should be opened and counted and a revised tally of ballots issued.

6. Respondent engaged in objectionable conduct warranting that the election conducted in Case 5–RC–14133 be set aside if the revised tally of ballots fails to establish that the Union secured a majority of the valid votes counted.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). That backpay shall include any increased commuting expenses incurred by Mark Barnes as a result of the discriminatory change of his reporting site from Beaver Heights, Maryland, to Central Garage, Virginia.

The constructive discharge of all of these employees, except Pace, having been accomplished by the discriminatory move of a portion of Respondent's operations from Beaver Heights, Maryland, to Central Garage, Virginia, and by discriminatorily transferring work to other business entities, Respondent shall be required to revoke that move and reestablish the drivers' reporting site at its offices in Beaver Heights, Maryland, and otherwise fully restore the status quo, as it existed on December 22, 1994.[40]

Because of the Respondent's egregious, widespread, and continuing misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).[41]

[Recommended Order omitted from publication.]

[40] As Respondent has retained all of its facilities in Beaver Heights, Maryland, and continues to conduct the same business operations, it appears that no undue hardship or cost will attach to its resumption of its operations as they existed prior to December 22.

[41] I must reject the Charging Party-Petitioner's request for attorney fees as no predicate has been shown to warrant such a unique remedy. See *DTR Industries*, 311 NLRB 833, 847 (1993), wherein litigation expenses were denied notwithstanding that the unfair labor practices were extensive and pervasive, warranting a broad cease and desist order, inasmuch as that respondent's defenses were debatable rather than frivolous and turned, in part, on resolutions of credibility. Respondent's unfair labor practice in this case may be similarly described.